Lian Lee Construction Sdn Bhd v Joyous Seasons Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–860 OF 2005
MOHD YAZID JC
23 JUNE 2008

Land Law — Caveats — Remove caveat — Application to — Whether caveator had caveatable interest on land — Whether first defendant's failure to pay amount agreed in letter of award gave plaintiff a caveatable interest — Whether irrevocable power of attorney for valuable consideration had given plaintiff caveatable interest — Whether there were serious questions to be tried — Whether balance of convenience lies in favour of caveator

The first defendant was the trustee for the Calvary Life assembly (Chinese) A/G, which was a church and not a legal entity that was being managed by the second defendant. The first defendant had by a letter of award appointed the plaintiff to carry out various renovation works to its buildings situated in Lot 1385 and 1386 in Melaka ('the land'). According to the letter of award the contract price of RM8m for the renovation works was to be paid in four phases. The payment for phase 1 also included the making of an advance minimum payment of RM1m by the end of 2004 in three instalments. It was an admitted fact that the second defendant had collected monies from the public for the purpose of raising funds to pay for the renovation works carried out by the plaintiff. On the same date as the letter of award the first respondent executed an irrevocable power of attorney to secure the payment of the balance of the contract price or any part thereof still owing to the plaintiff. After receiving the letter of award, the plaintiff had commenced with the renovation works and had completed 50% of the works for phase 1 as at the end of 2004 but had only received payment in the amount of RM230,000 and not the minimum advance payment of RM1m as promised in the letter of award. As a result of the defendant's failure to fulfill the terms of the letter of award, the plaintiff had instituted the present suit by filing a writ against the defendants claiming the balance payment amounting to RM1.07m for the completed renovation works and RM1.2m as damages for alleged loss of business profits. Thereafter the plaintiff entered a private caveat on the land for the first defendant's failure to pay the amount agreed in the letter of award and based on the power of attorney. When the plaintiff was served with a Form 19C to remove the caveat that it had entered on the land, it filed an ex parte application for an order to extend the caveat it had entered

by the plaintiff until the final disposal of the plaintiff's suit against the defendants. This application was granted with costs in the cause. Thereafter the defendants filed the present application to set aside the ex parte order and for the removal of the caveat. The main issues before the court in this matter were whether the plaintiff had a caveatable interest on the land, whether there was a serious issue to be tried in this case and whether the balance of convenience lays in favour of the plaintiff while awaiting the outcome of the court's decision. The defendant submitted that the plaintiff had no caveatable interest in the land but that the only interest the plaintiff had was a monetary claim based on the letter of award and that such a purely monetary claim would not amount to a caveatable interest. It further submitted that the power of attorney was nothing more than an agency document to enable the plaintiff to deal with the land on behalf of the defendants. The plaintiff on the other hand submitted that it had a caveatable interest on the land and that the power of attorney in effect gave the plaintiff the absolute discretion to deal with the land including the right to transfer the land to itself where the first defendant was unable to settle the monies owed to the plaintiff.

Held, dismissing the application with costs in the cause:

(1) Once the plaintiff was given an irrevocable power of attorney for valuable consideration to enable the plaintiff as the donee to sell, assign or charge to any person the land and for that purpose to sign and execute all assignment transfers and other necessary instruments, the said power of attorney had given the plaintiff a caveatable interest on the land. The irrevocable power of attorney was given by the first defendant to the plaintiff as a security for the payment of the contract price for the performance of the renovation works in the letter of award and the plaintiff's interest on the land was derived from the power of attorney. As such the power of attorney was not a limited power to deal with the land in a limited manner as submitted by the defendants (see paras 17–18); *Liew Mok Poh @ Liew For Chen & Chong Yat Min v Balakrishnan a/l Muthuthamby* followed.

(2) The plaintiff's right apart from being conferred by the irrevocable power of attorney was also conferred by contract created by the letter of award. It is settled law that a claim to an interest in land arising under a contract was sufficient to support a private caveat (see para 21).

(3) The issues filed into court by the parties showed that there were serious issues to be tried in this case. Issues such as whether the defendants were justly and truly indebted and liable to the plaintiff for its claim of RM1.07m and the further sum of RM1.2m as damages for alleged loss of profit; whether the works of the plaintiff were defective; and whether the plaintiff was entitled to the claims when its plans had not been

A approved by the appropriate authorities were examples of some of these serious issues to be tried (see para 23).

(4) The facts admitted such as the fact that the first defendant was not a legal entity and had no property other than the land tips the balance in
B favour of retaining the existence of the caveat and maintaining the status quo (see paras 28–29).

[Bahasa Malaysia summary

C Defendan pertama adalah pemegang amanah untuk perhimpunan Calvary Life (Chinese) A/G, yang merupakan sebuah gereja dan bukan entiti sah yang diuruskan oleh defendan kedua. Defendan pertama melalui surat award telah melantik plaintif untuk melaksanakan pelbagai kerja pengubahsuaian kepada bangunannya yang terletak di Lot 1385 dan 1386 di Melaka (tanah
D tersebut'). Menurut surat award harga kontrak sejumlah RM8j untuk kerja pengubahsuaian telahpun dibayar dalam empat fasa. Bayaran untuk fasa 1 juga termasuklah membuat bayaran pendahuluan minimum sejumlah RM1j sebelum tahun 2004 dalam tiga bayaran ansuran. Ia fakta yang diakui bahawa defendan kedua telah mengumpul wang daripada orang awam bagi tujuan
E mengutip derma untuk membayar kerja pengubahsuaian yang dijalankan oleh plaintif. Pada tarikh yang sama seperti dalam surat award responden pertama telah menyempurnakan surat kuasa wakil yang tidak boleh batal untuk menjamin bayaran baki harga kontrak atau mana-mana bahagian daripadanya yang masih tertunggak kepada plaintif. Setelah menerima surat
F award itu, plaintif telah memulakan kerja pengubahsuaian dan telah menyiapkan 50% daripada kerja untuk fasa 1 setakat akhir tahun 2004 tetapi hanya menerima bayaran berjumlah RM230,000 dan bukan bayaran pendahuluan minimum RM1j seperti dijanjikan dalam surat award. Akibat kegagalan defendan untuk memenuhi terma-terma surat award tersebut,
G plaintif telah memulakan guaman ini dengan memfailkan writ terhadap defendan dengan menuntut baki bayaran berjumlah RM1.07j untuk kerja pengubahsuaian yang telah siap dan RM1.2j sebagai ganti rugi untuk kerugian keuntungan perniagaan yang dikatakan itu. Selepas itu plaintif telah memasuki kaveat persendirian atas tanah tersebut disebabkan kegagalan
H defendan pertama membayar jumlah yang dipersetujui dalam surat award dan berdasarkan surat kuasa wakil. Apabila plaintif disampaikan dengan Borang 19C untuk membatalkan kaveat yang telah dimasukkan ke atas tanah tersebut, ia telah memfailkan permohonan ex parte untuk perintah melanjutkan kaveat yang dimasukkan oleh plaintif sehingga selesai guaman
I plaintif terhadap defendan. Permohonan ini telah diberikan dengan kos dalam kausa. Berikutan itu defendan telah memfailkan permohonan ini untuk mengetepikan perintah ex parte dan untuk pembatalan kaveat itu. Isu-isu utama di hadapan mahkamah dalam perkara ini adalah sama ada plaintif mempunyai kepentingan kaveat atas tanah tersebut, sama ada

terdapat isu serius yang perlu dibicarakan dalam kes ini dan sama ada imbangan kesesuaian terletak menyebelahi plaintif sementara menunggu hasil keputusan mahkamah. Defendan menghujahkan yang plaintif tidak mempunyai kepentingan kaveat dalam tanah tersebut tetapi satu-satunya kepentingan yang plaintif ada hanyalah tuntutan wang berdasarkan surat award dan tuntutan wang semata-mata tidak membentuk kepentingan kaveat. Ia dihujahkan seterusnya yang surat kuasa wakil tidak lebih daripada dokumen agensi untuk membolehkan plaintif berurusan dengan tanah tersebut bagi pihak defendan. Plaintif sebaliknya menghujahkan ia mempunyai kepentingan kaveat atas tanah tersebut dan surat kuasa wakil itu memberikan plaintif budi bicara mutlak untuk berurusan dengan tanah tersebut termasuklah hak untuk memindah milik tanah itu kepadanya sendiri di mana defendan pertama tidak mampu melangsaikan wang yang tertunggak kepada plaintif.

Diputuskan, menolak permohonan dengan kos dalam kausa:

(1) Apabila plaintif diberikan surat kuasa wakil tidak boleh batal untuk pertimbangan bernilai bagi membolehkan plaintif sebagai penerima derma untuk menjual, menyerah hak atau menggadaikan kepada sesiapa tanah tersebut dan bagi tujuan itu untuk menandatangani dan menyempurnakan semua pindah milik serah hak dan alat lain yang perlu, surat kuasa wakil tersebut telah memberikan plaintif kepentingan kaveat ke atas tanah tersebut. Surat kuasa wakil tidak boleh batal telah diberikan oleh defendan pertama kepada plaintif sebagai jaminan untuk bayaran harga kontrak untuk pelaksanaan kerja pengubahsuaian dalam surat award itu dan kepentingan plaintif ke atas tanah tersebut datangnya daripada surat kuasa wakil itu. Oleh itu surat kuasa wakil itu bukan kuasa terhad untuk berurusan dengan tanah tersebut dalam cara terbatas seperti yang dihujahkan oleh defendan (lihat perenggan 17–18); *Liew Mok Poh @ Liew For Chen & Chong Yat Min v Balakrishnan a/l Muthuthamby* diikut.

(2) Hak plaintif selain daripada yang diberikan oleh surat kuasa wakil tidak boleh batal itu juga diberikan oleh kontrak yang dibuat oleh surat award itu. Ia adalah undang-undang tetap yang tuntutan untuk kepentingan dalam tanah yang timbul di bawah kontrak adalah memadai untuk menyokong kaveat persendirian (lihat perenggan 21).

(3) Isu-isu yang difailkan dalam mahkamah oleh pihak-pihak menunjukkan bahawa terdapat isu-isu serius yang perlu dibicarakan dalam kes ini. Isu-isu seperti sama ada defendan secara adil dan benar-benar berhutang dan bertanggungjawab kepada plaintif untuk tuntutannya sejumlah RM1.07j dan jumlah selanjutnya sejumlah RM1.2j sebagai ganti rugi untuk kerugian keuntungan yang dikatakan;

A sama ada kerja plaintif adalah cacat; dan sama ada plaintif berhak terhadap tuntutan itu sedangkan pelannya belum lagi diluluskan oleh pihak berkuasa yang berpatutan adalah beberapa contoh isu-isu serius yang perlu dibicarakan (lihat perenggan 23).

B (4) Fakta yang diterima seperti fakta yang defendan pertama bukan entiti sah dan tidak ada tanah selain tanah tersebut memberi kelebihan imbangan untuk mengekalkan kewujudan kaveat dan mengekalkan keadaan sebagaimana yang sedia ada tanpa dibuat sebarang perubahan (lihat perenggan 28–29).]

C **Notes**

For cases on caveats generally, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2152–2156.

D **Cases referred to**

Liew Mok Poh @ Liew For Chen & Chong Yat Min v Balakrishnan a/l Muthuthamby [1990] 1 CLJ 933 (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)

E *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 (folld)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Pembinaan Masdamai Sdn Bhd v Me-Wong Builders Sdn Bhd [1994] 2 MLJ 64 (refd)

Tan Geok Teck dan lain-lain lwn Upaya Kelana (M) Sdn Bhd [2007] 3 MLJ 497

F *Trans-Summit Sdn Bhd v Chun Nyook Lin* [1995] 3 MLJ 247 (refd)

Urethane Systems Sdn Bhd v Quek Yak Kang [2006] 6 CLJ 81 (refd)

Legislation referred to

G Power of Attorney Act 1949 s 6(1)(c)

Societies Act 1966

YC Lee (Thangaraj) for the plaintiff.
Wong Kim Fatt (Gulam & Wong) for the defendant.

H **Mohd Yazid JC:**

BACKGROUND

I **[1]** This is an appeal by the defendants against my decision in dismissing the defendants' application in encl 29 with costs. Enclosure 29 is the defendants' application for the following prayers:

(a) Bahawa perintah ex parte untuk melanjutkan kaveat persendirian No 4250/2005 yang dimasuki terhadap tanah-tanah yang dipegang

di bawah PN Lot 1065 dan PN 20276 Lot 1064, kedua-duanya Mukim Bertam, Daerah Melaka Tengah, Negeri Melaka, yang diberi oleh Hakim yang bijaksana Yang Arif Dato' Hj Abdul Malik b Hj Ishak pada 26 May 2006.

(b) Bahawa kaveat tersebut dipotong dengan segera.

(c) Ganti rugi ditaksirkan dan dibayar oleh plaintif kepada defendan pertama.

(d) Kos bagi permohonan ini dibayar oleh plaintif kepada defendan pertama.

(e) Lain-lain perintah dan relief mahkamah yang mulia ini anggapkan adil dan sesuai diberi.

[2] I had dismissed encl 29 based on the following reasons.

FACTS OF THE CASE

[3] I am of the opinion that it is pertinent to lay down the brief facts of this case in order to fully understand the circumstances that resulted in the defendants filing encl 29.

[4] By a letter of award dated 19 July 2001, the first defendant had appointed the plaintiff to carry out various works ie 'Proposed renovation works for Joyous Seasons Sdn Bhd as trustee of Calvary Life Assembly (Chinese) A/g No 2 Buildings and the connecting building held under HS(D)34798, Lot 1385 & 1386 both at Mukim Bertama Daerah Melaka Tengah Negeri Melaka'.

[5] In the letter of award, the contract price for the said works was RM8m encompassing four phases. The payment for the said works for each phase is as follows: for phase 1 RM2.9m; phase 2 RM4m; phase 3 RM1.5m and phase 4 RM2.5m. The defendants were also to make advance minimum payment, inter alia, for phase 1, that is the phase related to the application in encl 29, on the following dates ie in August 2004 the amount of RM300,000; in September 2004 the amount of RM300,000 and in December 2004 the amount of RM400,000.

[6] On the same date as the letter of award ie 19 July 2001, the directors for the first defendant executed an irrevocable power of attorney (the said power of attorney) in line with the terms of the letter of award. The said power of attorney was executed by the first defendant's directors to secure the payment of the balance of the contract price or any part thereof still owing to the plaintiff subject to the terms of the said power of attorney.

[7] After receiving the letter of award, the plaintiff had entered the construction site and commenced with the renovation works. As at the end of 2004, the plaintiff had completed 50% of the works for phase 1 but had only received payment from the first defendant in the amount of RM230,000. The plaintiff had not received the minimum advance payment of RM1m as promised in the letter of award.

[8] As a result of the first defendant's failure to fulfill the terms of the letter of award, the plaintiff had instituted the present suit by filing a writ of summons and statement of claim on 3 August 2005 claiming for the balance payment amounting to RM1.07m for the 50% renovation works completed and RM1.2m as damages for alleged loss of business profits.

[9] On 21 September 2005, the plaintiff entered a private caveat on the said land via No 4250/2005. The reasons for entering the private caveat are as follows:

> Pemilik tanah gagal membayar wang yang dicatat dalam surat bertarikh 19 Julai 2004 bagi kerja-kerja renovasii yang dibuat atas tanah tersebut oleh Lim Lee Construction Sdn Bhd (102500-H) dan pemilik tanah telah memberi power of attorney bertarikh 19 Julai 2004 kepada kami untuk menjamin pembayaran wang kepada kami.

[10] Subsequently, on 9 February 2006, the plaintiff was served with Form 19C by the registrar of the Land Office, Melaka regarding the proposal to remove the caveat entered by the plaintiff.

[11] On 19 May 2006, the plaintiff took steps by filing an ex parte application in encl 21 for an order to extend the caveat entered by the plaintiff until the final disposal of the plaintiff's suit against the defendants. The main reason in support of encl 21 is that by virtue of the defendants' failure to make the payments to the plaintiff in line with the letter of award, the plaintiff is entitled to protect the security given by the said power of attorney by entering a caveat on the land. On 26 May 2006, YA Dato' Hj Abdul Malik bin Hj Ishak had allowed the plaintiff's application with cost in the cause.

[12] On 29 March 2007, the defendants filed encl 29.

ISSUES

[13] Whether the ex parte order dated 26 May 2006 should be set aside and the caveat removed.

[14] The principle considered by the court in considering this issue could be obtained from the Court of Appeal decision in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 where it was held that there are three stages to be considered in deciding an application to remove a private caveat ie:

(a) whether the caveator has a caveatable interest on the land;

(b) whether there is a serious issue to be tried; and

(c) whether, on the balance of convenience, it is convenient for the caveat to remain while awaiting the outcome of the court's decision.

Whether the plaintiff has a caveatable interest on the land

[15] The defendants' counsel argues that this is in the negative for the following reasons:

(a) the plaintiff is not a purchaser or a chargee of the land. The only interest that the plaintiff has (if any) is money due under the letter of award for the renovation works. Even the reason given by the plaintiff at the time of lodging the private caveat on the land relates to its monetary claim based on the letter of award;

(b) in any event, the plaintiff had delivered the land to the first defendant on 19 April 2005;

(c) the said power of attorney is nothing more than an agency document to enable the plaintiff (donee) to deal with the land on behalf of the defendants (donors). To support this argument, the defendants' counsel relies on the case of *Pembinaan Masdamai Sdn Bhd v Me-Wong Builders Sdn Bhd* [1994] 2 MLJ 64;

(d) based on these reasons, the plaintiff has failed to fulfill the first stage of proving caveatable interest on the land in line with the principle laid down by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor*;

(e) therefore, the defendants pray that the caveat be removed in line with the principle laid down in *Trans-Summit Sdn Bhd v Chun Nyook Lin* [1995] 3 MLJ 247; *Tan Geok Teck dan lain-lain lwn Upaya Kelana (M) Sdn Bhd* [2007] 3 MLJ 497; *Urethane Systems Sdn Bhd v Quek Yak Kang* [2006] 6 CLJ 81. These decisions, in essence, hold that a purely monetary claim would not amount to a caveatable interest.

[16] The plaintiff's counsel in rebuttal argues that the plaintiff has a caveatable interest on the land based on the letter of award that contains a clause for security for payment of the contract price and the said power of

attorney that gives an absolute discretion to the plaintiff to deal with the land including the right to transfer the land to the plaintiff itself in situations where the first defendant is unable to settle the monies owed to the plaintiff. For ease of reference, I would lay down the power of attorney:

POWER OF ATTORNEY

KNOWN ALL MEN BY THESE PRESENT THAT WE, JOYOUS SEASONS SDN BHD (599192-h) in company incorporated in Malaysia and having its registered address at No.10, Lorong Gereja, Melaka hereby nominate and appoint LIAN LEE CONSTRUCTION SDN bhd (102500-h) a company incorporated in Malaysia and having its registered address at Room 803, Sun Compleks, Jalan Bukit Bintang, 55100 Kuala Lumpur to be our attorney for us and in our name of otherwise to do all or any of the following things within the Federation of Malaysia in respect of all those parcel lands held under H.S.(D)34798 & 34799 Lot 1385 both at Mukim Bertam Daerah Melaka Tengah Negeri Melaka together with two buildings erected thereon (the buildings and the lands hereinafter collectively referred to as 'the said Property'):

1. To let, lease or sub-lease the said Property upon such terms as our said Attorney shall think advisable to accept the surrender of any lease or sub-lease and for that purpose to sign all necessary leases agreements surrenders our other instruments.

2. To sell, assign or transfer to any person the said Property and for that purpose to sign and execute all assignment transfers and other instruments necessary.

3. To charge or assign the said Property to any financial institution and for that purpose to sign all necessary charges assignment and other documents,

4. To borrow such sums of money and upon such terms as our said Attorney shall deem expedient upon the security of the said Property and for such purpose to give and execute such charges, bills of sale, guarantee or other of securities, and with such powers and provisions as may be though proper.

5. To enter into possession of the said Property, to increase the rents of the said Property, to renovate, improve or repair all or any of the said Property as occasion may require and to every other act and thing for the improvement of the same.

6. To accept the sub-lease of the said Property from any person or person upon such terms as our said Attorney may think fit and for that purpose to sign all necessary writings and other instruments relating thereto and to surrender same for cancellation, if advisable.

7. To apply to the State Authority is respect of any consent for the sale, transfer, charge and lease of the said Property.

8. To sign any documents in respect of the discharge of the said property and any related documents..

9. To concur in doing any of the acts and things herein contained with any person or persons interested in the said Property.

10. To substitute and appoint from time to time one or more attorney or attorneys with the same or more limited powers and such substitute or substitutes and pleasure to remove and another or others to appoint.

And generally to do all acts and things and sign and executed all such documents as may be necessary for effectuating any of the purpose aforesaid as fully and completely as we could do if personally present.

And we hereby agree to ratify and confirm all and whatsoever our said Attorney or its substitute or substitutes shall lawfully do in the premises by virtue of these presents.

And we hereby declare that the power of attorney hereby conferred being given for valuable consideration to be irrevocable.

IN WITNESS WHEREOF we have hereunto set our hand and seal this 19 JULY 2004 day of in the year two thousand and four (2004).

SIGNED, SEALED AND DELIVERED)
By JOYOUS SEASONS SDN BHD)
In the presence of:)

t.t t.t

....

Director Director

AUTHETICATION OF POWER OF ATTORNEY

I, Wang Phaik Mear, an Advocate & Solicitors of the High Court of Malaya practicing at Kuala Lumpur hereby certify that on this day of 19 July 2004 the common seal of JOYOUS SEASONS SDN BHD (599192-H) above mentioned was duly affixed to the above instrument in my presence in accordance with the regulations of the said Company.

No. Pendaftaran 69385/04
Salinan Pendua di simpan di Mahkamah Tinggi
Kuala Lumpur pada 27 August 2004
Di bandingkan dengan asal
t.t.

WITNESS MY HAND
t.t
WANG PHAIK MEAR
Advocate & Solicitor
Kuala Lumpur

Kerani
t.t
Penolong Kanan Pendaftar
Mahkamah Tinggi, Kuala Lumpur

[17] I am of the opinion that once the plaintiff is given an irrevocable power of attorney for valuable consideration to enable the plaintiff as the donee to sell, assign or charge to any person the said property and for that purpose to sign and execute all assignment transfers and other instruments necessary, the said power of attorney has given the plaintiff a caveatable interest on the land. This conclusion could be substantiated by the decision of YA Dato' Mahadev Shankar J (as he then was) in *Liew Mok Poh @ Liew For Chen & Chong Yat Min v Balakrishnan a/l Muthuthamby* [1990] 1 CLJ 933 at 934–935 that:

> ... This power of attorney was given for the valuable consideration represented by the loan of RM38,000 aforesaid and the instrument specifies that it was made irrevocable. Clause (1) of this power empowered the respondent to transfer, sell, charge, lease or otherwise deal with the said land.
>
> This power was given for valuable consideration and was made irrevocable. Accordingly under s 6(1)(c) of the Ordinance the respondent being the donee of the power cannot at any time be prejudicially affected by notice of anything done by the owner of the land as the donor of the power without the concurrence of the respondent. I agree with Mr Kanesalingam counsel for the respondent that it must be implied from this provision that once an irrevocable power for valuable consideration has been given, the donor cannot thereafter exercise any of the powers already given to the donee without the concurrence of the donee.
>
> The respondents' interest in the said land arose on the date on which the power was executed. It was an interest for which he had paid RM38,000 by way of a loan to the land owner.
>
> ... The respondent was entitled to look to the land for the recovery of h is loan which the owner had until 1 April 1990 to repay.
>
> The distinction between this case and *Rajinder Kaur v Jeswant Singh* [1987] 1 MLJ 214 is that is that case the power of attorney could be and was revoked at the material time whereas in ours the power is irrevocable.
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> *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Tudjun* [1994] 1 MLJ 145 and *Krishna Kumar v United Malayan Banking Corporation Bhd* [1983] 1 MLJ 107 are both instances where caveats were allowed to be maintained notwithstanding that the interest in question in the land was by way of a future expectation of an interest in land arising out of an existing contract imposing an obligation on the land owner.
>
> I therefore cannot agree that the respondent did not have a caveatable interest in this case. In the view of this court he had such an interest which he was entitled to protect by lodging his caveat.

[18] Based on the said power of attorney and relying on the authority in *Liew Mok Poh @ Liew For Chen & Chong Yat Min v Balakrishnan a/l Muthuthamby*, it could be summarised that:

(a) the said power of attorney given by the first defendant to the plaintiff for valuable consideration is a security for the payment of the contract price for the performance of the renovation works in the letter of award;

(b) the said power of attorney is irrevocable;

(c) the plaintiff's interest on the land is derived from the said power of attorney;

(d) the plaintiff is entitled to transfer the land to itself in order to secure payment of the contract price for the renovation works;

(e) under s 6(1)(c) of the Power of Attorney Act 1949, the first defendant is not entitled to deal with the land without the consent of the plaintiff.

[19] I am unable to accept the defendants' counsel's argument, relying on the decision of YA Richard Malanjum J (as he then was) in the case of *Pembinaan Masdamai Sdn Bhd v Me-Wong Builders Sdn Bhd*, that a power of attorney does not create an interest in a land. In that case, the power of attorney was only for the appointment and instructing of solicitors, architects and engineers for the purpose of negotiating or settling with the authorities concerned with regards to a specific land. In the present case, the said power of attorney does confer rights on the plaintiff to sell, transfer, charge or otherwise deal with the land. The said power of attorney gives to the plaintiff an absolute right to deal with the land beyond the right in the power of attorney in *Pembinaan Masdamai Sdn Bhd v Me-Wong Builders Sdn Bhd*. It is not a limited power to deal with the land in a limited manner such as in that particular decision.

[20] As for the second argument that the plaintiff had delivered the land to the defendants and the latter had accepted, I agree with the plaintiff's argument that this fact does not affect its rights over the land that was created by the said power of attorney. The fact remains that the defendants still owe the plaintiff for the balance of the contract price for phase 1 of the renovation works for the sum of RM1.07m.

[21] The plaintiff's right, apart from being conferred by the irrevocable power of attorney, is also conferred by contract created by the letter of award. I follow the Federal Court decision of *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 where it was unanimously held that a claim to an interest in land arising under a contract was sufficient to support a private caveat. Since there existed an issue whether the contract between the vendor

and the respondent was correctly terminated, the private caveat should be allowed to remain until the final outcome of the main suit.

[22] Similarly in the present case, there is an existing dispute regarding the actual payment due and payable from the defendants to the plaintiff. Applying the principle laid down in *Macon Engineers* and compounded by the existence of the irrevocable power of attorney, I find that the plaintiff does have a caveatable interest.

Whether there is a serious issue to be tried

[23] The present action has proceeded until the case management stage for purposes of full trial. The parties have filed into court their respective issues to be tried. I find that the issues to be tried are as follows:

(1) Whether the defendants are justly and truly indebted and liable to the plaintiff for its claim of RM1.07m, and to the further sum of RM1.2m as damages for alleged loss of profit.

(2) Whether the plaintiff is entitled to the claims when it had improperly altered or modified the first defendant's building plains without the knowledge and consent of the first defendant and the relevant authorities.

(3) Whether the plaintiff is entitled to the claims when it had carried out works only in phase 1 and that these works had been defective and not carried out properly in compliance with the terms and conditions.

(4) Whether the plaintiff is entitled to the claims when the plans of the structural consultants or engineers of the plaintiff had not been approved by appropriate authorities, and when the plaintiff as contended by the defendant had carried out improperly the structural works without the approved plans and had not given any proper certification of structural safety.

(5) Whether the works of the plaintiff were defective.

(6) Whether at all material times the values of these works by the plaintiff had been duly certified by a competent and appropriate professional person.

(7) Whether the plaintiff is entitled to enter a caveat on the lands involved when the plaintiff's claim, based on the letter of award dated 19 July 2004, is purely monetary and whether the plaintiff is liable to the 1st whether the defendants are entitled to set off the amount of

RM380,660 being the alleged works completed by new contractors appointed by the defendants;

[24] Based on the above issues, I find that the answer to the second issue is also in the positive.

Balance of convenience — whether it is convenient for the caveat to remain or otherwise

[25] There are two factors to be considered. Firstly, the fact is that the first defendant is the trustee for Calvary Life Assembly (Chinese) A/G that is being managed by the second defendant and the first defendant has no other property other than the land. Calvary Life Assembly (Chinese) A/G is not a legal entity and this is admitted in the declaration of trust by the second defendant dated 10 January 2003 that states that the church is not a body corporate or a registered society under the Societies Act 1966.

[26] Secondly, the second defendant had collected monies from the public for the purpose of raising fund to pay for the renovation works carried out by the plaintiff. These facts are affirmed in para 12 of encl 20 (the affidavit in support to encl 21—the plaintiff's application for extension of caveat). These averments by the plaintiff is not denied by the defendants in the affidavit in reply. I refer to the principle enunciated by YA Dato' Gopal Sri Ram in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at p 286 that:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issues, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

Ng Hee Thoong & Anor v Public Bank Bhd is upheld in *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 that:

> Before us, Mr PS Gill for the appellant contended — and, in our opinion, rightly on the facts and circumstances of this case — that the material averments contained in the appellant's affidavits filed in support of the application were never answered and hence must be taken to have been admitted.

[27] Therefore, I find that the defendants have taken steps to settle the payment for the contract price for the renovation works undertaken by the plaintiff. Furthermore, the defendants' sole property is the land in this suit. I find that the balance tips in favour of retaining the existence of the caveat and maintaining the status quo because of these two reasons.

A CONCLUSION

[28] Seeing that there is an irrevocable power of attorney that confers on the plaintiff the right to deal with the land even to the extent of selling the land to the plaintiff itself, I find that this claim is not a purely monetary claim. I am also satisfied that there are serious issues to be tried between the parties and the issues have been agreed to by the parties themselves. Further, the balance of convenience lies in favour of maintaining the status quo of the private caveat on the land. Based on the foregoing reasons, I dismissed encl 29 with cost in the cause.

Claim dismissed with costs in the cause.

Reported by K Nesan